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10/682,083	10/10/2003	Frieder K. Kempe	K032 0024/BMG	9194
720 7590 06/19/2009 OYEN, WIGGS, GREEN & MUTALA LLP 480 - THE STATION 601 WEST CORDOVA STREET VANCOUVER, BC V6B 1G1 CANADA			EXAMINER MATTER, KRISTEN CLARETTE	
			ART UNIT 3771	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/682,083
Filing Date: October 10, 2003
Appellant(s): KEMPE, FRIEDER K.

Bruce M. Green
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/17/2009 appealing from the Office action mailed 11/26/2007.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

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(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,146,351

KEMPE

11-2000

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

**Claims 1-70 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kempe
US Patent No. 6,146,351.**

As to claims 1 and 11, Kempe discloses an article (see fig.1, 10) made of FARABLOC, which is used to treat pain (DOMS) in a patient. Kempe lacks the teaching of the article being specifically used to treat pain caused by “an inflammatory disease,” but discloses that the device is used to treat pain caused by muscle soreness (abstract) and that muscle soreness is generally regarded as a result of an inflammatory response by persons of ordinary skill in the art (see column 1, lines 50-55 and lines 62-67; and column 2, lines 1-8, in which use of anti-

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inflammatory drugs reduce pain associated with muscle soreness). Additionally, Kempe teaches one of the treatment steps being shielding the affected areas of the patient from high frequency electromagnetic radiation (“shielding painful areas of a human body with a cloth”, col.2 lines 46-47; regarding “not shielding” and “low frequency”, applicant on page 5 lines 15-19 stated that low frequency electromagnetic fields can be accomplished by wrapping clothing with a sheet of textile where the textile is made from a radiation shielding textile; “FARABLOC” shielding textile, see page 5 lines 20-25) which is also required by the claimed invention. Thus, it would have been obvious to one of ordinary skill in the art at the time the invention was made to consider that Kempe’s article could be used for treating any pain caused by inflammatory disease, regardless of how that inflammation/pain was caused (i.e., muscle soreness from exercise, tendonitis, etc.) because it is well known that muscle soreness is likely the result of an inflammatory response that causes pain (which Kempe’s article is specifically disclosed as treating) and that anti-inflammatory treatments help reduce the pain associated with muscle soreness.

As to claim 2, Kempe lacks wherein said high frequency electromagnetic radiation has a frequency greater than about 1 megahertz, and **as to claim 3**, Kempe lacks wherein said low frequency electromagnetic radiation has a frequency less than about 1 megahertz. However, applicant on page 5 lines 15-26 seem to render that the claimed megahertz can be accomplished by the use of a radiation shielding textile and further identifies that textile being “FARABLOC”. Since Kempe US’351 discloses a suitable cloth for the practice of the method of treating pain which both provides the appropriate electromagnetic shielding and the comfort of a standard non-metallic textile is a fabric sold under the trade-mark FARABLOC (see col.4 lines 21-24), it

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would have been obvious to one of ordinary skills in the art to consider Kempe's disclosed textile fully capable of providing the radiation frequency required by claims 2 and 3.

As to claim 4, Kempe teaches wherein said shielding is accomplished by covering the affected area of said patient with a radiation-shielding textile for a period of time sufficient to reduce said symptoms (col.2 lines 46-51).

As to claim 5, Kempe teaches wherein said radiation-shielding textile comprises between two and thirty-five percent by weight of a continuous system of electrically conductive fibers and the remainder of non-conductive fibers (col.2 lines 46-51).

As to claim 6, Kempe teaches wherein said radiation-shielding textile is a woven cloth and said electrically conductive fibers are stainless steel fibers (col.2 lines 51-53).

As to claim 7, Kempe teaches wherein said radiation-shielding textile is a woven cloth and said electrically conductive fibers are formed of a material selected from the group copper, silver or ceramic (col.4 lines 33-34)

As to claim 8, Kempe teaches wherein said radiation-shielding textile is a knitted fabric and said electrically conductive fibers are stainless steel fibers (col.4 lines 25-26).

As to claim 9, Kempe teaches wherein said radiation-shielding textile is a knitted fabric and said electrically conductive fibers are formed of a material selected from the group copper, silver or ceramic (col.4 lines 25-26, 34-35).

As to claim 10, Kempe teaches wherein said radiation-shielding textile comprises about thirteen percent by weight of a continuous system of electrically conductive fibers and the remainder of non-conductive fibers (col.4 line 26).

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As to claim 12, Kempe teaches wherein radiation-shielding cloth comprises between two and thirty-five percent by weight of a continuous system of electrically conductive fibers and the remainder of non-conductive fibers (col.2 lines 46-51).

As to claim 13, Kempe teaches wherein said electrically conductive fibers are formed of a material selected from the group copper, silver or ceramic (col.4 lines 25-26, 34-35).

As to claim 14, Kempe teaches wherein said radiation-shielding textile comprises about thirteen percent by weight of a continuous system of electrically conductive fibers and the remainder of non-conductive fibers (col.4 line 26).

As to claims 15-70, Kempe teaches the claimed invention as applied for claim 1 above. Kempe discloses a method of treating pain of muscle soreness that is the result of an inflammatory response/process using a FARABLOC textile article (see col.4 lines 21-24) but does not specifically mention treating the claimed inflammatory diseases. However, since Kempe teaches treating pain caused by muscle soreness that is regarded as the result of an inflammatory response, it would have been obvious to one of ordinary skills in the art at the time the invention was made to use the article of Kempe to treat any other type of pain that is caused by an inflammatory response, including the claimed conditions/diseases, because one of ordinary skill in the art would recognize that the success of treatment of pain caused by an inflammatory response is not dependent upon how/why that inflammation was produced (i.e., exercise, tendonitis, bursitis, etc.), but only on treatment of the inflammation that was associated with the pain by use of the article.

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(10) Response to Argument**D) Rejection of claims 1 and 11 under 35 U.S.C. §103(a)**

In response to appellant's arguments involving an inherency rejection, examiner acknowledges that the previous examiner may have misspoken when using the term "inherent" in the rejection. A person with DOMS does not necessarily have the various claimed "inflammation diseases." However, the rejection was clearly an obviousness 103 rejection and although it is not inherent that use of the Kempe device is for treatment of inflammation diseases such as those claimed in the instant application, examiner respectfully maintains that it would have been obvious to one of ordinary skill in the art at the time of the rejection to have treated any pain resulting from inflammation with Kempe's article, regardless of how the inflammation was caused, because Kempe teaches that muscle soreness is generally regarded as being caused by an inflammatory response and that use of the article is for treating pain associated with muscle soreness.

Additionally, examiner notes the declarations submitted by the appellant as evidence to the contrary are actually in alignment with the examiner's position, not contradictory to it. Examiner does not hold the position that muscle soreness is an "inflammatory disease," as suggested by the declarations, only that muscle soreness is the result of inflammation and therefore any pain associated with inflammation could obviously be treated with the article of Kempe by one of ordinary skill in the art. In the declaration by Dr. Clement, in point 3, lines 3-4, Dr. Clement acknowledges that muscle soreness is the result of an inflammatory "process" not a "disease." Although examiner does not believe that there is a patentable difference between a "process" and a "disease," this evidence supports the obviousness rejection that treatment of any

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“inflammatory process” (which would occur with any inflammatory disease else there would be no inflammation and thus no inflammatory disease) would have been obvious to one of ordinary skill in the art by Kempe’s device because Kempe explicitly treats pain resulting from muscle soreness, which is the result of pain from an inflammatory response of healing. Additionally, Dr. Hershler acknowledges in point 4, lines 3-4 that DOMS is a disorder of pain in muscle, and as discussed above, evidence in Dr. Clement’s declaration and the Kempe patent both support the position that muscle soreness is the result of pain caused by inflammation. Accordingly, treatment of any pain caused by inflammation with the device of Kempe would have been obvious to one of ordinary skill in the art with a reasonable expectation of success, also in light of the fact that other anti-inflammatory treatments have been proven to reduce pain associated with muscle soreness.

II) Rejection of claims 2-10 and 12-70 under 35 U.S.C. §103(a)

Appellant presents no new arguments regarding claims 2-10 and 12-70. Therefore, please see the above response with regards to claims 1 and 11.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Kristen C. Matter/
Examiner, Art Unit 3771

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Conferees:

/Justine R Yu/
Supervisory Patent Examiner, Art Unit 3771

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